STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Macomb)

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs-Appellees,

-vs-

EDWARD SCHULAK, HOBBS & BLACK, INC., Architects and Consultants,

Defendant-Appellant.
_____/

Supreme Court No: 126859
C.A. No: 245934
L.C. No: 00-1912 CE

BRIEF OF AMICUS CURIAE THE CONSTRUCTION ASSOCIATION OF MICHIGAN (CAM), SHEET METAL & AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION (SMACNA),GREAT LAKES FABRICATORS AND ERECTORS ASSOCIATION (GLFEA), AND PLUMBING AND MECHANICAL CONTRACTORS OF DETROIT (PMC)

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STATEMENT OF ORDER APPEALED FROM

The Amicus Curiae represented in this Brief incorporates by reference the Statement of Order Appealed From contained in Defendant-Appellant Edward, Schulak, Hobbs & Black, Inc.'s Application for Leave to Appeal from the July 8, 2004 decision of the Michigan Court of Appeals rendered in *Ostroth v Warren Regency, GP, LLC,* 263 Mich App 1; 687 NW2d 309 (2004).

STATEMENT OF ISSUES

DOES THE SIX YEAR STATUTE OF REPOSE SET FORTH IN MCL 600.5839 OPERATE TO THE EXCLUSION OF THE TWO YEAR STATUTE OF LIMITATIONS APPLICABLE TO MALPRACTICE ACTIONS AGAINST ENGINEERS AND ARCHITECTS AND OF THE CORRESPONDING THREE YEAR LIMITATIONS PERIOD APPLICABLE TO NEGLIGENCE ACTIONS AGAINST CONSTRUCTION CONTRACTORS?

Defendant-Appellant says "Yes."

Amicus Curiae says "Yes."

Plaintiff-Appellee says "No."

The trial court said "Yes."

The Michigan Court of Appeals said "No" while creating a split of authority on the issue.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Construction Association of Michigan (CAM) is a 120-year old trade association with nearly 4,000 members, including general contractors, subcontractors, construction service providers, suppliers and commercial contracting businesses. Since its inception in 1885, CAM has provided a variety of services to its members. These services include educational and training programs, labor relations, safety, job reporting, marketing assistance, insurance programs, insurance programs, workers' compensation, credit unions, and a variety of additional services designed to assist CAM members to run their businesses in better and more efficient ways.

The Sheet Metal & Air Conditioning Contractors National Association (SMACNA) Metropolitan Detroit Chapter is a local member of the national association located in Washington, D.C., which includes approximately 150 chapters around the nation. SMACNA Detroit provides services and products to the sheet metal industry, and is primarily involved in labor relations, safety, insurance programs and a variety of additional services. SMACNA Detroit's purpose is to conduct a trade association of employers and to advance and promote the general welfare of the sheet metal industry as it is related to the fabrication and installation of air handling systems. SMACNA Detroit is intimately involved with the inspection community, unfair utility competition, legislative and political action, safety, code enforcement and other technical and educational programs.

The Great Lakes Fabricators and Erectors Association (GLFEA) is a Michigan corporation, located in the city of Detroit, County of Wayne. GLFEA is a construction trade association, whose membership is variously engaged in steel fabrication, steel erection, machinery installation, rigging and related activities. GLFEA's members include 59 firms of

various sizes, from small to nationally ranking, competing on local, regional, national and international bases.

The Plumbing and Mechanical Contractors of Detroit (PMC) is comprised of 134 contractors and the Metropolitan Detroit Plumbing and Mechanical Contractors Association (MDPMCA) is comprised of 44 members, all who contract to furnish, fabricate, and install piping and piping systems of all kinds, including all systems of heating, cooling, ventilating, refrigeration, air conditioning, plumbing, power piping, industrial and process piping, sprinkler piping, temperature control piping, high and low pressure boilers, stokers, oil burning equipment, gad burning equipment, pneumatic piping, hydraulic piping, insulation, sheet metal work, testing and balancing, service, maintenance and energy management in Southeastern Michigan.

This appeal involves issues significant to both the jurisprudence of the State and to the Construction Association of Michigan (CAM), Sheet Metal & Air Conditioning Contractors National Association (SMACNA), Great Lakes Fabricators and Erectors Association (GLFEA), and Plumbing and Mechanical Contractors of Detroit (PMC). Specifically, the published decision of the Court of Appeals in this action purports to eliminate the two year statute of limitation in professional malpractice actions against architects and engineers, and the three year statute of limitations in negligence actions against construction contractors in actions in which the six year statute of repose also applies.

Indeed, enforcement of the six year repose period set forth in MCL § 600.5839 to the exclusion of MCL 600.5805(6) effectively adds four years to the existing professional malpractice and general negligence statute of limitations in construction related litigation. The Michigan Supreme Court should grant leave to appeal and allow the Construction Association

of Michigan (CAM), Sheet Metal & Air Conditioning Contractors National Association (SMACNA), Great Lakes Fabricators and Erectors Association (GLFEA), and Plumbing and Mechanical Contractors of Detroit (PMC) to accept the filing of this Amicus Curiae Brief to address fully the implications of the published decision of the Court of Appeals upon the construction industry.

STATEMENT OF FACTS

Amicus Curiae, The Construction Association of Michigan, et al., incorporate by reference the Statement of Facts contained in Defendant-Appellant's Application for Leave to Appeal.

ARGUMENT

THE SIX YEAR STATUTE OF REPOSE SET FORTH IN MCL 600.5839 DOES NOT OPERATE TO THE EXCLUSION OF THE TWO YEAR STATUTE OF LIMITATIONS AND THREE YEAR STATUTE OF LIMITATIONS GOVERNING, RESPECTIVELY, PROFESSIONAL MALPRACTICE AND GENERAL NEGLIGENCE ACTIONS AGAINST ARCHITECTS, ENGINEERS AND CONSTRUCTION CONTRACTORS.

A. Standard of Review

This case involves questions of statutory interpretation as well as the review of the grant of summary disposition by the trial court; this Court must therefore review these issues *de novo*. Roberts v Mecosta, 466 Mich 57, 62; 642 NW2d 663 (2002), Omelenchuk v City of Warren, 466 Mich 524, 527; 646 NW2d 493 (2002).

B. Discussion of Background to Statute of Repose

MCL 600.5805(6) and (10) respectively set forth a two-year statute of limitations for professional malpractice actions against architects and engineers and a three year limitations period for negligence actions against construction contractors. See also, City of Midland v Helger Const Co, 157 Mich App 736, 740-741; 403 NW2d 218 (1987). However, § 5805(14) (former § 5805(10)) also directs attention to MCL 600.5839[1]:

> The period of limitations for an action against a state-licensed architect, professional engineer ... based on an improvement to real property shall be as provided in section 5839.
>
> MCL 600.5805(14).

[1] Amendments effective March 31, 2003 to § 5805 added two subsections and redesignated several other subsections including former subsections (4) and (10). The Court of Appeals' opinion did not cite to the new designations. This Brief will cite to the current designations of the subsections.

MCL 600.5839 provides in pertinent part:

> No person may maintain any action to recover damages for ... bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property ... against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor .... However, no such action may be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.
>
> MCL 600.5839(1).

As originally enacted, § 5839 protected architects and engineers and served as a statute of repose by limiting the actionable period in actions arising from construction defects to six years after the time of occupancy, use, or acceptance of the improvement. The purpose of § 5839(1) was to relieve those professionals of open-ended liability for alleged defects in their workmanship. O'Brien v Hazelet & Erdal, 410 Mich 1, 14; 299 NW2d 336 (1980). However, § 5839 originally did not apply to similar claims against construction contractors.

§ 5839(1) was thus amended in 1985 to apply as well to all actions against contractors and to permit extension of the six-year repose by a one-year discovery provision applicable to claims of gross negligence (with a final limitation of ten years). Witherspoon v Guilford, 203 Mich App 240, 245-246; 511 NW2d 720 (1994). **Through the addition of current § 5805(14), § 5839 now "applies to all claims against architects, engineers, or contractors for injuries arising from improvements to real property, whether involving the original or third parties, and whether based on tort or contract." Id, citing Michigan Millers Mutual Ins Co v West Detroit Bldg Co, 196 Mich 367, 375-378; 494 NW2d 1 (1992).**

In O'Brien v Hazelet & Erdal, 410 Mich 1; 299 NW2d 336 (1980), the Michigan Supreme Court addressed a constitutional attack upon MCL 600.5839. Specifically, it was argued in that action that § 5839 violated due process because it served as a statute of limitations, yet operated to potentially bar a cause of action before all the necessary elements constituting the action were present. Id, at 14.

The O'Brien court, in rejecting the constitutional attack upon the statute, observed that the statute indeed operated as both one of limitation and one of repose. The Supreme Court reasoned that in "actions which accrue within six years from occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. Id, at 14-15. However, it was further observed that when more than six years have elapsed from the time before an injury was sustained, the "statute prevents a cause of action from ever accruing" and thus operated as a statute of repose. Id. O'Brien concluded that, in the latter circumstance, "the plaintiff is not deprived of a right to sue a state licensed architect or engineer because no such right can arise after the statutory period has elapsed." Id, at 15.

In Witherspoon, supra, the Michigan Court of Appeals addressed for the first time the issue controlling over the instant action: whether the existence of the six-year period of repose set forth in § 5839 precludes application of the shorter limitation periods of § 5805, where the cause of action arises within six years after use or acceptance of the improvement. The Witherspoon Court held that the six-year period does not operate to the exclusion of the limitation periods of § 5805. 203 Mich App at 246-247. The Court reasoned as follows:

> We understand section 5839, together with section 5805(10), to set forth an emphatic legislative intent to protect architects,

> engineers, and contractors from stale claims. However, because we must interpret the statute as a whole, reading each section in harmony with the rest of the statute, *Michigan Millers, supra*, we do not understand those provisions to expand the general three-year period of viability for injury claims under § 5805(8) to a six-year period insofar as the claims apply to those protected by § 5839. While it is possible, as plaintiff argues, that the Legislature intended to expand the period of liability as a "trade-off" for the protection afforded by the provision, we find no hint of such an intent in the provision itself or elsewhere. Moreover, our adoption of this interpretation would necessarily render § 5805(8) nugatory in such cases, an effect that this Court must avoid in constructing statutes. *Id.* Because the Legislature in enacting these provisions did not clearly indicate that it intended through section 5839 to breathe additional life into claims that would otherwise have expired under section 5805(8), we choose not to read that intention into the statute.
>
> Id., at 247.

C. The Court of Appeals Erroneously Relied Upon and Misconstrued Statements of Dicta in *O'Brien* and *Michigan Millers* in Issuing an Opinion in Conflict With *Witherspoon* Without Following the Procedures Set Forth in MCR 7.215 (J).

MCR 7.215, governing the "precedential effect of published decisions," states that "a panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or by a special panel of the Court of Appeals..." MCR 7.215(J). Statements of dicta, however, do not constitute a "rule of law" within the meaning of this Court Rule and thus are not binding under either MCR 7.215 or similar principles of *stare decisis*. Carr v City of Lansing, 259 Mich App 376, 387-388; 674 NW2d 168 (2003), Colucci v McMillin, 256 Mich App 88, 97, fn 6; 662 NW2d 87 (2003). Dicta is a judicial comment made in the course of delivering a judicial opinion which is unnecessary to the decision in the case and not otherwise germane to the controversy. Carr, supra. Statements

of the Supreme Court in dicta have no precedential value. See, e.g., People v Sobczak-Obetts, 253 Mich App 97, 103-104, fn 4; 654 NW2d 337 (2002).

In creating a conflict with Witherspoon, the Court of Appeals' opinion below concluded that it was obliged to instead follow O'Brien v Hazelet & Erdall; supra, and Michigan Millers v West Detroit Building Co, Inc, 196 Mich App 367; 494 NW2d 1 (1992), which, in statements of dicta, stated that § 5839 served as both a statute of limitations and a statute of repose. 410 Mich at 15; 196 Mich App at 378. **Contrary to the Court of Appeals' ruling herein, those statements in O'Brien and Michigan Millers did not constitute the "rule of law" established in those actions and did not otherwise constitute binding precedent which compelled it to create a conflict with Witherspoon.** In any event, even if those same statements were controlling as "the rule of law," they were misapplied by the Court of Appeals in this action. Indeed, O'Brien never analyzed whether § 5805 could operate in tandem with § 5839 in professional malpractice actions. Rather, O'Brien's statements merely served as potential functions of § 5839 in the abstract without consideration of its relationship with §5805.

In O'Brien, the Michigan Supreme Court addressed the Plaintiff's claim that § 5839 violated due process because it could potentially operate to bar a cause of action before the accrual of all the necessary elements of the action. As its "rule of law," the O'Brien Court held that § 5839 did not violate due process and that the legislature could constitutionally extinguish the right to recover for damages incurred after the six year period set forth in that statute. 410 Mich at 15-16. **Significantly, none of the Plaintiffs in O'Brien were injured by alleged design defects that were discovered within that six year period.** Id. Cf. Fennell v Nesbitte, Inc, 154 Mich App 644, 648-649; 398 NW2d 481 (1986).

In addition, O'Brien parenthetically stated that § 5839 served as both a statute of limitations and a statute of repose, ignoring that the distinction was completely unnecessary or even germane to the constitutional challenge before it. 410 Mich at 15. Nonetheless, that recognition was explained earlier in this brief; to wit, that whether it operated either as a statute of limitation or of repose depended upon whether the cause of action accrued prior or after the six year period of repose. Id. O'Brien never held or even intimated that § 5839 superseded the limitations periods of § 5805 when the latter expired before the expiration of the six year repose period.

In Fennell, supra, the Michigan Court of Appeals held that the "limitations" and "repose" characterizations in O'Brien were dictum and "[d]eclined the Plaintiffs' invitation to apply the dicta in O'Brien" to the case before it, involving claims that were discovered shortly before expiration of the six year period of § 5839. The Court of Appeals' in Fennell held that it did "not read MCL 600.5839... as a 'discovery' statute of limitations" as characterized by O'Brien. **Fennell instead concluded that "the intent of the Legislature was that [§ 5839] be one of repose – no action can be filed after that period of time has elapsed." 154 Mich App at 649-650.** Fennell also held that the fact that the Legislature amended § 5839 to expressly provide a "discovery" statute of limitations where gross negligence is alleged but failed to similarly amend the six year period for claims for ordinary negligence buttressed its "conclusion that the statute is one of repose" only. 154 Mich App at 650.

The statement in Michigan Millers, supra, that § 5839 served as both a statute of repose and a statute of limitation was similarly not the "rule of law" in that action; that characterization was also dicta and -- in the context asserted in that action -- did not serve as "the rule of law" to allow the Court of Appeals below to create a conflict with Witherspoon.

In Michigan Millers, the plaintiffs argued that § 5839(1) did not govern their claims because they were building owners alleging damages for defects in the improvement of the structure itself, rather than third parties who sustained personal injuries which "arose out of" the defective improvement. Instead, the plaintiffs asserted that the three year statute of limitations in § 5805(8) applied to their claims. In this regard, the plaintiffs there relied upon several prior Court of Appeals' cases which had held that MCL 600.5839(1) only applied to third party actions (e.g., actions filed by plaintiffs not in direct privity with the defendants).[2]

The Court of Appeals in Michigan Millers held that the addition of § 5805(14) [former § 5805(10)] supra, was intended to overrule these cases and concluded that the Legislature's intent "was to apply the statute of limitation contained in § 5839(1) to all actions brought against contractors [architects and engineers] on the basis of an improvement to real property, including those brought by owners for damage to the improvement itself." 196 Mich App at 378. **This was its rule of law.** The Court in Michigan Millers concluded that the Plaintiffs' claim was time barred because it was brought more than six years after the use of the improvement, as dictated by § 5839(1).

In Michigan Millers, the Court of Appeals cited the O'Brien characterization of § 5839 as both a statute of limitation and a statute of repose. However, again, that purported distinction was not the "rule of law" in that case and was not necessary to that case's adjudication. That distinction again was dicta, rather than binding precedent upon the Michigan Court of Appeals in this action.

[2] See, e.g., Burrows v Bidigare, 158 Mich App 175; 404 NW2d 650 (1987), Midland v Helger Construction Co, 157 Mich App 736; 403 NW2d 218 (1987) and Marysville v Pate, Hirn & Bogue, 154 Mich App 655; 397 NW2d 859 (1986).

In any event, the original statement in O'Brien that § 5839 may be considered both a statute of limitations and statute of repose was not intended to operate to the exclusion of § 5805. As stated, the O'Brien Court was not presented with whether § 5839 displaces the otherwise applicable paragraph of § 5805. O'Brien intended nothing more than to explain that § 5839 could arguably apply as a statute of limitation when the cause of action accrued within the six year period described therein. O'Brien again never intended to address or otherwise analyze the extent to which § 5839 could operate in tandem with § 5805. O'Brien simply was not concerned with that issue.

Consequently, the Court of Appeals below erroneously cited O'Brien and Michigan Millers as supporting its creation of a conflict with Witherspoon, supra. The Court of Appeals here erroneously relied upon statements of dicta in its effort to subvert the "first out" rule of MCR 7.215 (J). The Court of Appeals' opinion must be vacated.

D. MCL 600.5805(14) Does Not Independently Compel Application of MCL 600.5839 to the Exclusion of the Other Paragraphs of § 5805.

MCL 600.5805(14) states:

> The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in § 5839.
>
> MCL 500.5805(14).

The Court of Appeals below erroneously held that this subsection reinforced "the O'Brien Court's opinion that MCL 600.5839 is not only a statute of repose, but also a statute of limitations." To the contrary, § 5805(14) does not compel application of § 5839 to the exclusion of the general statutes of limitations set forth in § 5805 when the action accrues prior to the six year period set forth in § 5839.

As indicated, the Court of Appeals in Michigan Millers acknowledged that the Legislative intent in amending MCL 600.5805 to add current ¶ (14) was instead overrule the preexisting Michigan Court of Appeals' cases which had held that § 5839 only applied to third party actions. 196 Mich App at 371, 378; hence, the specific language employed in § 5805(14) dictating application of § 5839 to any action against "a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property." MCL 600.5805(14). O'Brien and Michigan Millers are completely devoid of any language substantiating that when a cause of action accrues prior to the six year period after the time of occupancy, § 5839 would apply to the exclusion of MCL 600.5805(6) [actions against architects or engineers] or § 5805(8) [the three year general statute of limitations for negligence actions against contractors."

For these reasons, the Court of Appeals in this action erroneously cited currently MCL 600.5805(14) as supporting the application of MCL 600.5839 as both a statute of limitations and a statute of repose to the exclusion of the balance of the statute of limitations set forth in § 5805. If the Legislature intended to supersede § 5805 in this manner, it could have plainly done so.

The Michigan Court of Appeals' opinion must be vacated in favor of an order reinstating the trial court's grant of summary disposition for this reason as well.

CONCLUSION

For the foregoing reasons, Amicus Curiae CAM, SMACNA, GLFEA and PMC respectfully request that this Honorable Court vacate the July 8, 2004 written opinion of the Michigan Court of Appeals and reinstate the trial court's summary disposition order.

Respectfully submitted,

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